

Senftner Volkswagen Corporation and District No. 162, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 18-CA-6559

July 24, 1981

DECISION AND ORDER

On February 27, 1981, Administrative Law Judge Robert E. Mullin issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,¹ findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Senftner Volkswagen Corporation, Sioux City, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except the attached notice is substituted for that of the Administrative Law Judge.

¹ Contrary to the Respondent's contentions, we find that the Administrative Law Judge did not err in allowing the Union to utilize for cross-examination purposes the affidavit of Dennis Senftner. We also find that *National Association of Broadcast Employees and Technicians (AFL-CIO-CLC) (Poole Broadcasting Company)*, 182 NLRB 603 (1970), relied on by the Respondent, is not controlling. In that case, the Board indicated at fn. 1 that, in adopting the recommendation that the complaint be dismissed, it relied only on the alternative finding that the alleged violation was moot at the time of the hearing. It is therefore clear that the Board did not adopt the Trial Examiner's analysis of Sec. 102.118 of the Board's Rules and Regulations, Series 8, as amended.

² The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

We agree with the Administrative Law Judge that the Respondent violated Sec. 8(a)(4), (3), and (1) by initially refusing to reemploy John Newman as a mechanic and by withdrawing its subsequent offer of reemployment. In doing so we note that, although the Administrative Law Judge did not make a specific finding of pretext, he rejected all of the Respondent's asserted reasons for its conduct by labeling them as "afterthoughts." It is therefore clear that the Administrative Law Judge implicitly found that the reasons set forth by the Respondent for its refusal to reemploy Newman were pretextual.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to reemploy or otherwise discriminate against employees because they engage in concerted activity protected by Section 7 of the National Labor Relations Act.

WE WILL NOT refuse to reemploy or otherwise discriminate against employees because unfair labor practice charges under the Act have been filed on their behalf.

WE WILL NOT interrogate any employee concerning that individual's union interests or activity in a manner constituting a violation of Section 8(a)(1) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer immediate and full reemployment to John O. Newman in his former position as a mechanic in the service department or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights or privileges, and make him whole for any loss of wages or other benefits that he may have suffered as a result of our discrimination against him, with interest.

SENFTNER VOLKSWAGEN CORPORATION

DECISION

STATEMENT OF THE CASE

ROBERT E. MULLIN, Administrative Law Judge: This case was heard by me on August 28 and 29, 1980, in Sioux City, Iowa, pursuant to a charge duly filed and served,¹ and a complaint issued on March 28, 1980. The complaint presents the question as to whether the Respondent violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended, in its refusal on January 26, 1980, and thereafter, to hire John O. Newman as a mechanic subsequent to his termination as a supervisor. In its answer, duly filed, the Respondent conceded certain facts with respect to its business operations, but it denied all allegations that it had committed any unfair labor practices.

¹ The original charge was filed on February 11, 1980. A first amended charge was filed on March 19, 1980.

At the hearing, the General Counsel and the Respondent were represented by attorneys, and the Charging Party by its Grand Lodge representative. All parties were given full opportunity to examine and cross-examine witnesses, and to file briefs. On October 3, 1980, briefs were received from the General Counsel and the Respondent.

Upon the entire record in the case, including the briefs of counsel, and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Iowa corporation with an office and place of business in Sioux City, Iowa, is, and has been, at all times material herein, engaged in the retail sale and service of new and used automobiles. During a 12-month period prior to the issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operations, had gross revenues in excess of \$500,000. During that same period, the Respondent purchased and received at its Sioux City dealership, goods and materials valued in excess of \$50,000 directly from points outside the State of Iowa. Upon the foregoing facts, the Respondent concedes, and it is now found, that Senftner Volkswagen Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

District Lodge No. 162, International Association of Machinists and Aerospace Workers, AFL-CIO, herein-after called the Union or IAM, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

On December 1, 1977, the Union was certified as the bargaining agent for a unit made up of the Respondent's full-time and regular part-time employees in its service, parts, and body shop departments, but with the exclusion of office clericals, professional employees, guards and supervisors. After a series of bargaining conferences, the parties signed a collective-bargaining agreement on July 5, 1978, to be effective on that date and to remain in effect until January 4, 1981.

John O. Newman, then a mechanic in the service department and a member of the Union's negotiating committee, was one of the signatories to that agreement. Thereafter, he served as an assistant shop steward and later as the shop steward, the latter being the post which he held until he was promoted to a management position.

Newman spent approximately 7 years as a mechanic in the service department. There he was recognized as one of the most skilled and responsible members of the work force. During the course of his employment, the Respondent paid all of his expenses to attend several inservice automotive maintenance courses offered in Chicago and Minneapolis. He also passed the entire series of certification tests given by the National Institute for Auto-

motive Service and, as such, was the only mechanic in the shop with those qualifications. When the contract with the Union became effective, a new category, denominated "Advanced Technician" was established. Newman was one of only three employees whom the Respondent selected for this classification and, as a result, he received a wage which substantially exceeded that for all other mechanics' ratings.²

In August 1979, Dennis Senftner, then in charge of the Sioux City dealership, selected Newman as the service manager. Newman testified that at the time Senftner offered him this promotion he inquired as to his future with the Company should he be unsuccessful as the service manager, or found that he did not like the job. According to Newman, Senftner told him that if such a situation developed, he could return to the shop as a mechanic. Dennis Senftner corroborated Newman's version of this conversation. Senftner also testified that later he discussed Newman's concern about his future with Gloria Senftner, secretary-treasurer of the corporation, and one of the Employer's representatives in the collective-bargaining negotiations. According to Dennis Senftner, after this discussion with Gloria Senftner, he reported to Newman "there was a section in the contract that covers that [the subject of a supervisor's return to the unit]."³ This was article X, section 10.7. It read as follows:

If an employee leaves the bargaining unit to take a supervisory job with the right to hire or fire, or effectively recommend, he shall have sixty days to keep his seniority rights. If he does not go back into the bargaining unit within said sixty (60) days, he automatically cancels all seniority rights.

Newman accepted the promotion to service manager and remained in that role until the latter part of January 1980. It was undenied that within less than 2 months after he became a supervisor he concluded that he did not like the work and sought to return to his old job as a mechanic. At a point not long before Thanksgiving in 1979, Newman told Dennis Senftner that he did not feel he was doing a good job as service manager, that he was having trouble with employee relations, and that he would prefer to work as a mechanic. According to Newman's undenied testimony, Dennis Senftner reassured him that he was doing good work and that "after a time things would iron themselves out."⁴ Later, in a similar conversation with Senftner, Newman discussed what he considered his problems in customer relations and asked his superior if the Company would send him to a Dale Carnegie course. According to Newman, Senftner told him he would consider the suggestion and might enroll

² The Respondent's high regard for Newman's ability as a mechanic was reflected in the remarks which Gloria Senftner, secretary-treasurer of the Company, volunteered when the collective-bargaining agreement was signed. According to the credible, undenied, and uncontradicted testimony of Richard Sturgeon, she commented at that time that "if she had all John Newmans and Jim Kempers [the latter being the union steward] she would have no problems in the shop, that their production and their work was to be held up as a model for others."

³ The quotation is from Dennis Senftner's testimony.

⁴ The quotation is from Newman's credible, undenied testimony.

him in such a school. Newman testified that, after several other conversations with Senftner along these lines, Senftner promised that he would start the search for someone to replace Newman in the post of service manager.

According to Newman, early in December he again asked Dennis Senftner whether the Company had found such a replacement and, although Senftner answered in the negative, he also told Newman that advertisements for a replacement had appeared in the Omaha and Minneapolis newspapers. However, when Newman bought copies of those papers and scanned them for any such advertisements he found none. According to Newman, about the middle of that same month, Dennis Senftner initiated a conversation in which he suggested that Newman might return to the shop as a "working foreman." This was a position covered by the collective-bargaining agreement in article IX, section 9.3. That section provided that an employee designated as a working foreman would be paid at 50 cents above the hourly rate for an advanced technician. Newman testified that Senftner told him that although this would cause the loss of his seniority⁵ he, at least, would be in the same pay bracket as an advanced technician. According to Newman, in another conversation near the end of December, Senftner told him that a tentative replacement named Steven Sembach had been found, but that the latter lacked what Senftner described as "product knowledge," or familiarity with the special problems connected with servicing Volkswagen automobiles. Newman testified that Senftner again brought up the prospect of making Newman a working foreman because of his extensive knowledge of the field and because in that position he would provide much needed support for a new service manager such as Sembach. Newman further testified that in January 1980 he had several additional conversations with Senftner, in each one of which the latter continued to discuss the prospect that Newman would become a working foreman as soon as a replacement service manager was secured.⁶

Newman was off work on Tuesday, January 22, and Wednesday, January 25, because of illness. He telephoned the shop on the morning of January 22 and talked with Chris Krause, the service secretary, to report that he would be out sick. About an hour later, Krause called him back to ask if he was all right. Newman testified that he answered her in the affirmative, and told her that he was at home because he had the "flu." Douglas Lehr, the service advisor in the shop, worked at a counter that was next to Krause's desk. Lehr testified that on that particular morning, and after Krause concluded her conversation with Newman, Krause left her desk for a short while and, upon returning, asked Lehr

to telephone Newman to "find out what he was doing."⁷ According to Lehr, upon making this call he questioned Newman as to why he was not at work and the latter replied that he was sick. Both Lehr and Newman testified as to the conversation which followed, and during which Newman complained bitterly about what he described as numerous promises which Dennis Senftner had given to the effect that he (Newman) would be allowed to return to the shop as a mechanic, but which remained unfulfilled because the Senftners were making no effort to find anyone to replace him as service manager. Lehr testified that during this discussion with Newman he heard a click as if someone else was getting on the line. According to Lehr, immediately after concluding his conversation with Newman, Dennis Senftner summoned him to his office for a report on the discussion with Newman. When Lehr declined to offer any details, Senftner told him "Don't feed me that. I know what was said." When Lehr continued to decline to give a detailed answer, notwithstanding Senftner's persistent questioning, the latter dismissed him with an inquiry as to whether his loyalty was to the Company or to his friend. Lehr answered that it was to his friend, and left the room.

Late on the afternoon of January 25, Dennis Senftner called Newman to his office. There he asked Newman what his "problem" was, whereupon the latter responded that he had no problem other than that he resented "having my phone calls listened in on. . . ." At that point, Newman again asked if a replacement had been found for the post of service manager. Senftner did not respond to this question. Instead, he announced that Newman was being discharged, giving no reason other than that James Senftner had decided to terminate him. Newman immediately reminded Dennis Senftner of his promise, made when Newman first became service manager, that he could always return to the shop as a mechanic. According to Newman, Senftner acknowledged having made this commitment, but stated that he could not make any comment on it at that time. The two men then talked at some length. Senftner acknowledged in a pretrial affidavit that he told Newman that he would contact James Senftner with regard to Newman's returning to work as a mechanic. According to Newman, Dennis told him that he would "call Jim later that night and talk to him and try to persuade him to give me my job back as a mechanic in the service department."⁸

Newman further testified that the following conversation then ensued between him and Dennis Senftner:

We talked on a little bit more and then he said, "This is off the record and if it's brought up again, I'll deny it, but . . . if you go back out in the shop, are you going to join the Union?" And I said, "What the hell has the union got to do with it? It was your promise." [Then] he said, that Jim [Senftner] told him that if I went back out in the shop and joined the union, that it would make the

⁵ By that time the 60-day grace period provided in art. X, sec. 10.7, to preserve the seniority of an employee promoted out of the unit to a supervisory position, had already expired for Newman.

⁶ When on the stand, Dennis Senftner did not deny or contradict Newman's testimony to the effect that the latter, from at least Thanksgiving 1979, frequently discussed with Senftner a desire to be relieved of his duties as service manager and return to the shop. Accordingly, since Newman's testimony on this issue was credible, it is now found that his testimony about the conversations with Dennis Senftner, as related above, accurately reflects the substance of those discussions.

⁷ The quotation is from Lehr's credible, undenied, and uncontradicted testimony.

⁸ The quotations in this paragraph are from Newman's testimony.

union twice as strong and Jim just wouldn't have that.

According to Newman, he thereupon asked Senftner what he would give the unemployment office as the reason for his termination and Dennis replied, "At this time, I don't have an answer for you."

In a gesture of friendship, Senftner then invited Newman to join him at Cozy's Bar, whereupon the two men retired to the latter, a nearby tavern. On leaving the bar, Senftner volunteered that he would telephone James Senftner that evening and discuss the matter of Newman's returning to work as a mechanic. According to Newman's credible and undenied testimony, Dennis Senftner concluded their discussion with the statement "I'm almost sure that I can get your [old] job back."

The following day was a Saturday and, normally, the shop was closed for the weekend. Newman, however, went in to do some repair work on the car of a friend who was one of the salesmen. It was work he had committed himself to perform as a favor to the individual. Dennis Senftner was present in the dealership at that time. While there, the latter informed Newman that he had made the telephone call to Des Moines as he had promised, but that it had been futile, that his uncle "was sore" at Newman, and that he had failed to persuade the Respondent's president to reemploy Newman in the shop.⁹ When Newman then asked about the promise of reemployment which Dennis had made the preceding August, the latter told him that his uncle had dismissed this commitment on Dennis' part as a promise which the latter could not keep.

Before Newman left the shop that day, Dennis made several conciliatory gestures. He offered Newman a termination check which he had on his desk the night before and also volunteered to give him an additional \$50 in cash. Newman declined both, however, with the explanation that he owed money for automotive parts he had purchased for his own car and that the following week he would settle up with the bookkeeper. A short while later, when Newman was unable to start his own car as he was about to leave the premises, Dennis gave him a free battery.

Early the next week Newman returned to the shop where he met with Dennis Senftner to request that he be given his vacation pay as well as pay for the 2 days of the preceding week when he had been ill. Senftner refused to do so on the ground that Newman was not entitled to either. After this rejection, Newman immediately went to the union headquarters where he solicited the assistance of Richard Sturgeon, business representative for District 162.

In a letter dated January 30, 1980, and addressed to Gloria Senftner, secretary-treasurer of the Company, Sturgeon wrote as follows:

Dear Mrs. Senftner:

Re: John Newman

This office represents the above-named discharged employee of your firm. He has advised me that he

is due two days' pay (for 1/22/30 and 1/23/30) plus two weeks' paid vacation. He further advises that Mr. Dennis Senftner refuses to allow payment of the same.

Please be advised that: if Mr. Newman has not received his wages as outlined above by February 8, 1980, we will be forced to file court action for damages plus attorney fees.

Yours truly

Richard Sturgeon
Directing Business Representative
District 162, IAMAW

At the hearing, Gloria Senftner acknowledged that this letter was received by the Respondent in the normal course of business.

On February 8, Dennis Senftner telephoned Newman at his home to tell him that the Company had decided to give him back his job as a mechanic. Newman's response was that he would have to discuss the proposal with his wife and would contact him later.¹⁰ Newman gave the following testimony as to the sequence of events which followed: On February 9, Dennis Senftner telephoned Newman and the two made an appointment to meet at the dealership on the morning of February 11. On the latter date, Newman arrived on time for his appointment, but after a 45-minute wait for Dennis, he was informed that the latter was busy and had left the premises. On February 13, Newman contacted Dennis on the telephone and told him that he would accept the job offer. According to Newman, however, at this point Senftner told him that he would have to discuss the entire matter with Ray Bender, who was then the acting service manager. On February 15, in another telephone call to Dennis as to when he should report for work, Senftner told him that "things were slow" and that "until things picked up we are going to put you on temporary layoff." On February 18, Newman again telephoned Senftner to secure a more definite date as to when he would be returning to work. At this time, Dennis cut short the conversation with the declaration "we have decided to . . . terminate you. . . . You are no longer employed."¹¹

Sturgeon, business representative for the Union, testified that on February 13 he telephoned Dennis Senftner to inquire as to when Newman would be put back to work, and that Senftner told him that the Company was not going to reinstate Newman. Sturgeon further testified that several months later and in July 1980, Dennis Senftner came to ask for the Union's assistance in securing mechanics for the shop because of a serious shortage of qualified craftsmen. According to Sturgeon, he thereupon told Senftner that Newman, the best mechanic he could find, was unemployed and then made the suggestion "You ought to put him back to work." Sturgeon tes-

¹⁰ The foregoing findings are based on Newman's credible testimony which, as to this issue, corroborated Dennis Senftner. The latter was not positive as to the date, but testified that he was "reasonably certain" that it was on February 7. Significantly, Senftner acknowledged that in this conversation he offered to take Newman back to work as a mechanic.

¹¹ The quotations in this paragraph are from Newman's testimony.

⁹ The quotation is from Newman's credible, undenied testimony.

tified that Senftner's response was "Every time we talk, you bring up John Newman. You know I can't put him back to work." Sturgeon's testimony was credible. It also was undenied and uncontradicted.

B. *The Status of Dennis Senftner*

The complaint, issued on March 28, 1980, alleged in paragraph 4 that, at all times material, Dennis Senftner was a supervisor and agent of the Respondent and its general manager. The Respondent filed two answers during April in which it admitted this allegation. Later, in August and on the eve of the hearing in this matter, the Respondent submitted, by telegram, an amendment wherein it denied the supervisory status of Dennis Senftner.

At the hearing, James Senftner, president and owner of the business, testified that Dennis Senftner, his nephew, did not possess the position or authority of general manager until midsummer 1980. The Respondent contends that until then James Senftner himself retained all the powers of the general manager with respect to the Sioux City dealership, and that throughout the period in question Dennis Senftner was not vested with any supervisory authority.

James Senftner is a man with large business interests. In addition to being the president of the Senftner Volkswagen Corporation in Sioux City, Iowa, he has a dealership in Des Moines, Iowa, which sells and services Porsche, Audi, and Mazda automobiles, and a Chevrolet dealership in Harried, South Dakota. The elder Senftner is the president and owner of all three corporations. He lives in Des Moines and spends the bulk of his time there. He testified that he carries out his managerial responsibilities as to the Sioux City operation via the telephone and by visits to that location about "once a week."¹² Sioux City is approximately 150 miles distant from Des Moines, and the Harried dealership is almost 450 miles away from Des Moines.¹³

Dennis Senftner is the 28-year-old nephew of James Senftner. He came with the Company in 1977 as an automobile salesman. In the summer of 1978 he was promoted to sales manager. In February 1979, he was promoted again. At the hearing he testified that at that time he was made the assistant general manager. In a pretrial affidavit, however, Dennis Senftner averred that, in February or March 1979, he was promoted to general manager of the Sioux City operations. In that same affidavit he gave "general manager" as his title and described his duties as follows: "My job is to make the day to day business operation [run]. The executive money decisions are made by Jim Senftner."

At the hearing, Dennis Senftner testified that his authority to hire and fire was limited to the lowest level, such as "wash boys." This testimony was in conflict with other testimony adduced at the hearing. Newman credibly testified that at the time he was promoted to the post of service manager in August 1979 Dennis Senftner told him:

That he was general manager over the dealership, that he was the head of all departments, that if I had any problems . . . to come to him and he would straighten it out for me and [that] I was taking orders directly from him.

Newman testified that, during the time that he was the service manager, Dennis Senftner regularly conducted weekly management meetings, which were attended by all of the department heads.¹⁴ According to Newman, he never saw James Senftner at any of these meetings. Newman testified that, during the course of his tenure he recommended the hiring of three different applicants for the position of mechanic and that Dennis hired all three.¹⁵ Newman further testified that in November or December 1979 he also recommended the discharge of an employee, one Diks, and that immediately thereafter Dennis terminated Diks.

It was undenied that throughout the period in question Dennis Senftner handled relations with the Union and that he was involved in the disposition of grievances arising under the collective-bargaining agreement. In one such matter involving an employee named John Perez, he wrote a letter on company stationery to District Lodge 162 which he signed "Dennis Senftner—General Manager." The letter was dated December 18, 1979.

James Senftner testified that he remained the general manager of the Respondent until the summer of 1980. On the other hand, the 300-mile round trip visits which he endeavored to make on a weekly basis to the Sioux City dealership did not constitute the day-to-day supervision normally associated with the role of a general manager.¹⁶ From the findings set out above, it is now found that from and after some time in the early spring of 1979 Dennis Senftner was the Respondent's man in charge at the dealership. He held himself out as such and the Respondent appeared to ratify his actions in this regard. The Respondent's own ambivalence as to his precise title is borne out by the shifting positions reflected in its various answers to the complaint. In any event, and whatever his title on the corporate organizational chart, it is also manifest that Dennis maintained close contact with his uncle James in connection with all of his management decisions. Consequently, and on the basis of the record and the conclusions set forth above, it is now found that,

¹⁴ In addition to the service shop of which Newman was the manager, Dennis Senftner testified that there were four other departments; namely, body shop, parts, sales, and business.

¹⁵ One of these was Douglas Lehr. The latter was hired in October 1979 as a service advisor. Lehr testified that Dennis was the only Senftner who interviewed him prior to his employment by the Respondent. His testimony was credible and undenied.

¹⁶ See *Dixon Industries, Inc.*, 247 NLRB 548, fn. 3 (1980). There three leadmen were found to be supervisors because their immediate supervisors were only present for brief periods of time, and were not engaged in the day-to-day production process and did not directly and actively supervise them. In *Lawrence Rigging, Inc.*, 202 NLRB 1094 (1973), the Board found that three employees were supervisors because they assigned, disciplined, and directed the work of the employees and also because to find otherwise would require a finding that over 40 employees were supervised by only the plant supervisor who rarely visited the plant. See also *Mid-Continent Refrigerated Service Company*, 228 NLRB 917, 920 (1977); *East Bay Newspapers, Inc.*, d/b/a *Contra Costa Times*, 228 NLRB 692, 696 (1977).

¹² The quotation is from James Senftner's testimony.

¹³ Senftner testified that he visited the South Dakota location two or three times a year.

at all times material herein, the Respondent held out Dennis Senftner as its general manager and that he was, throughout the period in question, a supervisor and agent of the Respondent within the meaning of Section 2(11) of the Act.

*C. The Alleged 8(a)(1), (3), and (4) Violations;
Findings of Fact and Conclusions of Law in
Connection Therewith*

Both Dennis and James Senftner denied that Newman's union affiliation or preferences were considered in arriving at the decision to refuse him reemployment as a mechanic. They specifically denied the references to the Union which Newman attributed to them in his testimony. When on the stand, Newman testified at length about these incidents. Throughout his appearance as a witness he was frank and convincing. Moreover, his testimony withstood an extended cross-examination by able counsel for the Respondent. In view of these factors, and his demeanor as a witness, it is now found that his testimony was truthful and that, insofar as there is a conflict in the record between his testimony and that of the Senftners, Newman was the more credible.

In a letter dated February 7, 1980, and addressed to the Regional Director of the Board's Region 18, Grand Lodge Representative Lorenz notified the Director that he was filing unfair labor practice charges against the Respondent; that copies of those charges were enclosed; and that one copy was being mailed by certified mail, return receipt requested, to the Respondent, pursuant to the Act. At the hearing, the Charging Party sought to introduce a return receipt for this certified mail. This receipt was dated February 9, 1980. Dennis Senftner testified that the signature on the receipt was not his and no other testimony was offered as to the identity of the signatory. This exhibit, that is, the receipt and the enclosure (a copy of the unfair labor practice charge on which the complaint in this matter was initiated) appears in the exhibit file as Charging Party's Exhibit 2. At the hearing, and upon the objection of the Respondent that it had not been properly identified, the exhibit was rejected and the undersigned directed that it be placed in the rejected exhibit file. At the same time, the parties were asked to review the question involved in this ruling on submitting their briefs. Both the General Counsel and the Respondent have done so in an able discussion of the issues.

Section 102.14 of the Board's Rules and Regulations specifically states that it is the responsibility of the Charging Party, and not the Regional Director, to serve, timely and properly, a copy of the charge on the party against whom the charge is made. Section 102.112 provides that when service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. Finally, Section 102.113 makes the date of service "the day when the matter served is deposited in the United States Mail, or is delivered in person. . . ." The Board's Rules do not make actual notice a requirement. Although Dennis Senftner testified that he did not recognize the handwriting on the return receipt and that the signature was not his, when questioned as to whether the Union's charge had been received at the Sioux City dealership, he responded, "Most likely I got it and for-

warded it [to the Senftner office in Des Moines]." Later, to the question as to whether he recalled getting the Union's charge on February 9, the date on which the receipt was signed, he replied: "To be very honest about it, when I received it I . . . breezed through it and then filed it so that Mrs. [Gloria] Senftner or Mr. [James] Senftner could go with it and handle it." Dennis Senftner did not deny that he received notice of the charge, and from the foregoing testimony on his part it is clear that he had such notice. In *N.L.R.B. v. E. L. Clark, Owner, Jim H. Pierce, Lessee of Ashville-Whitney Nursing Home*, 468 F.2d 459, 465 (5th Cir. 1972), the court there held that the proper test as to whether an unfair labor practice charge was properly served is "whether in the circumstances the procedure used would in all probability have informed the defendant of the proceedings against him."¹⁷ See also *N.L.R.B. v. T. A. McGahey, Sr.; T. A. McGahey, Jr.; Mrs. Altie McGahey Jones and Mrs. Wilda Frances McGahey Harrison, d/b/a Columbus Marble Works*, 233 F.2d 406, 408-409 (5th Cir. 1956); *Montgomery Hospital*, 233 NLRB 752, fn. 1 (1977); *G. W. Wilson, a/k/a G. W. Trucks; Upland Freight Lines, Inc.*, 240 NLRB 333, 334-335 (1979).

Upon a consideration of the foregoing findings and the relevant portion of the Board's Rules, quoted, *supra*, the earlier ruling, which rejected Charging Party's Exhibit 2, is set aside, and the rejected exhibit is now received. Finally, in view of the letter which Sturgeon sent to Gloria Senftner, dated January 30, as well as Charging Party Exhibit 2, it is now found that by February 9 the Respondent knew that Newman had requested the Union to assist him in resolving his differences with the Respondent as to the amount of wages then due him, and that the Respondent had knowledge that the Union had filed unfair labor practice charges against the Senftner Volkswagen Corporation.

At the hearing, Dennis Senftner conceded that in his conversation with Newman on the evening of January 25 he did not offer the latter the reason why he was being terminated. He also acknowledged that in a pretrial affidavit which he gave on March 5, 1980, he described the reason for Newman's dismissal from the post of service manager as being his "inability to get along with people." When on the stand, Senftner further acknowledged that prior to becoming service manager Newman had had the same problems in his interpersonal relations, but that there was nothing in his personnel file on this issue and that, notwithstanding this aspect of his personality, Newman was promoted to a supervisory position. James Senftner credibly testified as to several instances during the winter of 1979-80 when he had been annoyed by Newman's brusqueness and his attitude towards both him and the customers. It appears that on this basis the Respondent had cause to remove Newman from the position of service manager in the shop. That, of course, was an exercise of its managerial prerogative which is

¹⁷ In that same case the court also stated:

To effectuate the congressional policy in favor of service by mail, it is necessary that the NLRB be able to judge the quality of its attempts at service by something other than the fortuity of whether a defendant can be shown to have had actual notice. *Idem*.

not an issue in this case. When this matter came on for hearing, however, the Respondent advanced several other reasons for Newman's discharge as service manager. These will now be considered.

Thus, in the presentation of its case, the Respondent alleged that prior to his termination Newman had developed a bad record for tardiness and absenteeism. The principal witness produced by the Respondent on this issue was Chris Krause, the service secretary in the shop. She at first testified that during December and January, prior to Newman's termination, she had to telephone his home to ascertain whether he was coming to work on from "20 to 25 times."¹⁸ According to Krause, in January 1980, she began keeping a written record of Newman's tardiness and absenteeism. When confronted with the Company's record on Newman's attendance (which reflected no instance of tardiness), she was unable to explain or interpret it. She conceded that the record was not even in her handwriting and that, in fact, it was kept by Betty Conover, a coworker. Earlier in the hearing, Dennis Senftner himself had acknowledged that no records were kept as to an employee's tardiness. Krause's testimony on this issue was totally incredible. As to Newman's absentee record, only 4 days in January were in issue. Newman testified that he was absent on January 10 and 11, 1980, to assist his father, a cancer patient who was hospitalized in Rochester, Minnesota. During the hearing, Dennis Senftner conceded that he personally granted Newman permission to be off on those days. Later that month, on January 22 and 23, Newman was absent again. Newman testified that on the morning of January 22 he telephoned the shop. On getting Krause, he told her that he was sick and asked her to report to Senftner the fact that he had the "flu." It was on this morning, as found earlier, that she later called his home, to confirm whether he was still there and sick. Krause did not deny having received the telephone call from Newman as to his illness. Nor did she testify that she reported it to the management. Dennis Senftner only testified that he was never informed of the reason for Newman's absence on January 22 and 23, and that it was not excused. His denials in this regard were not convincing and are not found credible here.

At the hearing, the Respondent presented testimony as to several repair jobs which purportedly demonstrated Newman's inadequacies as a service manager and particularly in his handling of warranty work in the shop. A number of repair orders were offered in evidence, presumptively to illustrate Newman's ineffectiveness while a supervisor. In an extended examination as to these orders, it developed that at times Dennis Senftner had been dissatisfied with the work of certain mechanics, but that he had not criticized Newman when such problems arose. Moreover, when on the stand, Dennis Senftner acknowledged that there were no records which indicated that Newman was directly and personally responsible for the repair orders or the approval of the work which was the subject of those exhibits which the Respondent offered as the basis for its criticism of Newman's performance while he was service manager.

¹⁸ The quotation is from Krause's testimony.

Dennis Senftner's pretrial affidavit, given shortly after Newman's termination and long before the hearing in this matter, has no reference whatsoever to Newman's alleged tardiness, absenteeism, warranty work, supervision of the mechanics, or any other matter in that connection. It is my conclusion that these reasons, which were advanced at the hearing for Newman's dismissal, were afterthoughts on the part of the Respondent that were not developed until the time arrived for hearing preparation.

In March 1980 when Senftner gave his pretrial affidavit, he referred only to Newman's inadequacies as to public relations and his abruptness in dealing with customers. Newman, of course, was aware of his shortcomings in this regard. As found earlier, for at least 2 months before his termination, he had been requesting the Senftners to find a replacement service manager so that he could return to his former job as a mechanic. Furthermore, Newman's ineffectiveness as a supervisor had no bearing on and did not reflect on his proficiency as a highly skilled mechanic such as he had been prior to his promotion to the supervisory position. Finally, whatever Newman's problems may have been as a service manager, it was undenied that at no time prior to his discharge as a supervisor on January 25 had the Respondent disciplined him in any way or threatened to terminate him.

The Respondent does not deny that on February 7 or 8 Dennis Senftner made an effort to reemploy Newman as a mechanic, but it now contends that this offer was withdrawn, or rescinded, by James Senftner on February 8. Thus, Dennis Senftner testified that on the latter date he informed James Senftner that he had made an offer to reemploy Newman and that the Respondent's president thereupon announced that no such action would be countenanced, that Newman had been terminated earlier and could not be rehired. Similarly, James Senftner testified that when Dennis told him in a telephone conversation that a job offer had been made to Newman, he immediately countermanded this action and informed his nephew that "John Newman was terminated and my decision is final."¹⁹ According to the Respondent's president, in this same conversation he also emphasized that it was company policy that once an individual, such as Newman, had been in a management position he could not be returned to rank-and-file status because of the morale problem which such a decision would generate.²⁰

¹⁹ The quotation is from James Senftner's testimony.

²⁰ At the hearing, James Senftner testified that, in keeping with an asserted policy of not reemploying former supervisors as rank-and-file employees, he had refused to rehire six different foremen after their termination as supervisors. He named these individuals as Doug Darrah, Mike Pearson, Jim Funke, Bill Shirley, Orvis Berg, and Dale Twillman. Of the foregoing, however, all but Twillman were employed before 1977 when the Union attained bargaining rights for the mechanics employed at the Sioux City dealership. Obviously, the presence of art. X, sec. 10.7, in the collective-bargaining agreement, quoted *supra*, makes any custom or practice prior to the onset of union representation inapplicable to the circumstances surrounding Newman's return to the bargaining unit. Only Twillman, of those about whom James Senftner testified, had been employed as a supervisor after the collective-bargaining contract became effective. On cross-examination, Senftner acknowledged that Twillman had been discharged for theft and that after his discharge for this reason he

The testimony of the Senftners, related above, to the effect that the job offer to Newman was withdrawn as early as February 8 was not borne out in certain pretrial affidavits which they gave during the investigation of the unfair labor practice charge. Thus, in his pretrial affidavit, Dennis Senftner averred that it was in a telephone conversation with his uncle on February 9 or 10, rather than on February 8, that James Senftner vetoed the offer which had been made to Newman. Similarly, in a pretrial affidavit, dated March 5, 1980, and given less than 3 weeks after the incident in question, James Senftner averred:

It wasn't until February 11th or sometime during that week I learned that . . . Dennis had, in fact, offered John a job as a mechanic a few days earlier, [when] I heard this I told [him] I thought this was a hell of a mistake, that it was something we should never do, but from what I know, John [Newman] decided not to take the job after all. . . .

At the hearing the Respondent sought to establish that the job offer which Dennis Senftner had made to Newman had not been cleared with the president of the corporation and that as soon as James Senftner learned what his nephew had done he immediately countermanded the offer which Dennis had made. This testimony for the Respondent was not convincing. Dennis was the 28-year-old nephew of James Senftner. He had been placed in charge of the dealership in Sioux City, but had never been allowed to forget that his uncle was the owner and as such was the one who made all the important decisions. On January 25, James Senftner had directed that Dennis relieve Newman as the service manager. After Dennis notified Newman of this decision, and the latter reminded Dennis of an earlier commitment that he would always be able to return to the shop as a mechanic, Dennis telephoned his uncle and sought to secure such a job for Newman. The next day Dennis informed Newman that his efforts had been unsuccessful and that his uncle was "sore" at Newman and had refused to authorize Newman's rehire. Under these circumstances and with this background, it is most unlikely that on February 8, and hardly 2 weeks later, Dennis would have telephoned a job offer to Newman without being ordered to do so by President Senftner, or at least having secured the authorization of the latter for such a step. For Dennis to have acted otherwise, as to the Newman issue, only 2 weeks after the individual had been dismissed as the service manager, would have been tantamount to a brazen act of defiance as to his uncle and the owner of the business. Consequently, it is inconceivable that Dennis' job offer to Newman on February 8 was made without at least the concurrence of James Senftner, if not in compliance with a direct order from the Respondent to demand that Newman receive his vacation pay and wages for the 2 days when he was off sick. Whether the decision to reemploy Newman was made to settle this

matter or solely the services of a well qualified mechanic, it is most unlikely that Dennis Senftner's offer to Newman on February 8 was made without the full knowledge and concurrence of the Respondent's president. In any event, it is clear that the action of the younger Senftner was not an unauthorized frolic.

Newman credibly testified that on February 9 Dennis Senftner telephoned him and arranged for a meeting at his office on February 11. On the later date, however, when Newman reported for this meeting, he was told, after an extended wait, that Dennis was unavailable for any meeting that day. By February 13, when Newman managed to contact him by telephone, Dennis told him that the matter of his reemployment would have to await a conference with Ray Bender, the acting service manager. On February 15, Dennis stalled off a final answer to Newman with the statement that he was being put on "temporary layoff." Finally, on February 18, Dennis informed Newman "we have decided to terminate you."

On February 9, the Respondent received notice that the Union had filed an unfair labor practice charge against it. Any plans to settle with Newman about his claim for vacation pay and related matters then collapsed. Thereafter, the job offer, made only a day or two earlier, was abruptly canceled. Dennis Senftner, however, did not immediately notify Newman of this change. Instead, not until after much vacillation and after over a week had elapsed did he notify Newman that the Respondent would not bring him back to his former job as a mechanic.

The Respondent was free to make any decision it wished with respect to Newman's tenure as the service manager. From the record it is clear that he had been a less than perfect supervisor and, finally, he was terminated. Newman, however, had been an excellent auto repairman and had been promised at the time of his promotion to service manager that, in the event he was unsuccessful in that new role, he could return to the shop as a mechanic. Although the Respondent endeavored to establish that it had a long-standing policy against such a practice, its testimony in this connection was not persuasive. More importantly, the provision in the collective-bargaining agreement establishes that whatever the Respondent's practices may have been prior to the execution of that contract, by its acquiescence in article X, section 10.7, of that instrument, it agreed that henceforth a supervisor could be returned to the bargaining unit as a rank-and-file employee. Under those circumstances, it might be presumed that Newman, who had a reputation as an unusually proficient mechanic, would surely be returned to work as a rank-and-file employee in the shop.

The reason that the Respondent did not make such an offer on January 25, 1980, when Newman was informed that his services as a supervisor were no longer wanted, emerges from a further study of the record. While a member of the bargaining unit, Newman had been an active protagonist of the Union. He had been on the Union's negotiating team and had been one of those who executed the finalized collective-bargaining agreement as a union representative. Thereafter, he served as a union steward for the unit up to the moment he was appointed

did not seek to return as an employee. Newman, on the other hand, subsequent to his termination as service manager, made a request that he be returned to the bargaining unit, as he had been promised would be his privilege.

service manager. On January 25, 1980, Dennis Senftner at first questioned Newman as to whether he would rejoin the Union if he returned to the shop. The latter sought to avoid a direct answer to this query and reminded Senftner of his promise to reemploy him as a mechanic. Dennis Senftner then told Newman that President James Senftner felt that if Newman was back with the mechanics as a member of the Union "that . . . would make the union twice as strong and Jim just wouldn't have that." On the following day, when Dennis Senftner told Newman that his uncle would not reconsider the decision to discharge Newman it was apparent that the latter was denied reemployment as a mechanic because of his potential for strengthening the Union's position as a representative of the rank-and-file mechanics. By such action the Respondent violated Section 8(a)(3) and (1) of the Act. At the same time, it was also a violation of Section 8(a)(1) of the Act for Dennis Senftner to interrogate Newman as to whether he would rejoin the Union if he was rehired as a mechanic.

As found earlier, on February 8, 1980, Dennis Senftner, on behalf of the Respondent, offered Newman reemployment as a mechanic. The next day, however, the Respondent learned that the Union had filed an unfair labor practice charge on Newman's behalf in connection with the Company's refusal to rehire him 2 weeks earlier. At this point, the Respondent summarily withdrew its offer of reemployment for Newman; and on February 18, Dennis Senftner informed him that he had been "terminated." On the basis of the findings set forth earlier in connection with this incident, it is now found that the offer of reemployment which Dennis Senftner made to Newman on February 8 was withdrawn by the Respondent because of the unfair labor practice charge, which the Union had filed. By its action in notifying Newman to this effect on February 18, 1980, the Respondent violated Section 8(a)(4), as well as 8(a)(3) and (1), of the Act.

D. Procedural Rulings

During the hearing, Dennis Senftner was called as a witness by the Respondent. After direct examination by counsel for the Company, the General Counsel cross-examined this witness, utilizing in the process a pretrial affidavit which had been secured from Senftner by the Regional Office during its investigation of the original charge. At the conclusion of this examination, Harold P. Lorenz, the representative for the Charging Party, was allowed to cross-examine this same witness. Before engaging in this examination the Charging Party requested an opportunity to read Senftner's pretrial affidavit. This request was granted. Now the Respondent asserts that this ruling constituted reversible error on the ground that only a respondent may secure the Jencks' statements in possession of the General Counsel.²¹

²¹ In its brief, the Respondent appears to urge that it was also an error for the Charging Party to be permitted to retain Senftner's affidavit overnight to prepare for cross-examination the next morning. The latter ruling was in conformity with an earlier ruling whereby the Respondent, at its request, was permitted to retain, until the close of the hearing, copies of all pretrial affidavits of the General Counsel's witnesses, which it secured after each successive witness had testified. This latter ruling was based on

It is the Respondent's contention that whereas under Section 102.118(b)(1) and (d) of the Board's Rules and Regulations, Series 8, as amended (33 F.R. 9819 (1968)), a respondent may compel production of pretrial affidavits in the possession of the General Counsel, and then only upon a timely request, such a right may not be accorded a charging party. *National Association of Broadcast Employees and Technicians (AFL-CIO) (Pool Broadcasting Company)*, 182 NLRB 603 (1970).

Although the foregoing decision would appear to support the Respondent's position, it does not deal with the rights of the Charging Party during the course of the hearing as to that issue presented here.²² In *Spector Freight System, Inc.*, 141 NLRB 1110, 1111-15 (1963), the Board was concerned with a definition of the rights of a charging party, the issue having arisen after the presiding judge had severely limited counsel for the charging party in his attempts at active participation in the hearing. On appeal, the Board held that the restrictions imposed by the trial judge constituted error. In so holding, the Board cited Section 102.8 of the Board's Rules, which provides, in relevant part, that:

The term "party" . . . shall mean . . . without limitation any person filing a charge or petition . . . [and] any person named as respondent, as employer, or as party to a contract . . .

In deciding the basic rights of such a party, the Board relied on Section 102.38 of the Board Rules, which confer on "any party" to the proceeding:

. . . the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence. . . .

The Board then considered Section 102.35(f) of the Board's Rules, which gives an administrative law judge the authority "[to] regulate the course of the hearing," and Section 102.38, which gives an administrative law judge the right to limit the participation of any party, and concluded that these sections are merely counterparts of the Administrative Procedures Act which are designed to expedite administrative proceedings without impairing the right of the parties to participate therein. *Spector Freight System, Inc.*, *supra* at 1111.

a passage in the NLRB Casehandling Manual (Part One), Unfair Labor Practice Proceedings (1975), on this issue. Thus, section 10394.11 of the manual provides, in relevant part, "If counsel for the respondent desires, said counsel may be permitted to retain the copies [of pretrial affidavits it has been supplied] until the hearing is closed—including any periods of recess—provided they are utilized only for legitimate trial purposes. . . ."

²² All of the citations which appear on this general subject in *National Association of Broadcast Employees and Technicians, supra*, are concerned primarily with the issue of prehearing discovery. *Texas Industries, Inc., and Dallas Lightweight Aggregate Company, Texcrete Structural Products Company, Texcrete Mosaic Company, and Texcrete Company, Divisions of Texas Industries, Inc. v. N.L.R.B.*, 336 F.2d 128, 133 (5th Cir. 1964); *N.L.R.B. v. Vapor Blast Mfg. Company*, 287 F.2d 402, 407-408 (7th Cir. 1961); *The Raser Tanning Company v. N.L.R.B.*, 276 F.2d 80, 82-83 (6th Cir. 1960), cert. denied 363 U.S. 830; and *Film Inspection Service, Inc.*, 144 NLRB 1040, 1041, fn. 1 (1963).

It would appear from the foregoing conclusion of the Board that those provisions of the Board's Rules, on which it relies, grant full participatory rights to all parties, limited only by the duty of the Administrative Law Judge to eliminate irrelevant, immaterial, and unduly repetitious evidence. (5 U.S.C. §556(d).) From this it is reasonable to infer that Section 102.118 of the Board's Rules is not to be read as denying a charging party the right to a pretrial affidavit, but rather to be read as making clear the right of a respondent to have access to such an affidavit in the possession of the General Counsel.

The above conclusion has further support in Section 101.10 of the Board's Statements of Procedure, which sets forth the procedural rights of the parties, *in haec verba*:

(a) . . . [A]ll parties . . . have the power to call, examine and cross-examine witnesses and to introduce evidence into the record.

(b) (2) Every party has the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the fact.

From the above-quoted section, it is apparent that where a charging party is denied access to a pretrial affidavit, his power to cross-examine for impeachment purposes is severely impaired,²³ and, if the witness happens to be an official of the respondent, the charging party is denied the use of the affidavit as a potential admission by a party opponent.²⁴

Finally, the Charging Party's ultimate right to review is a further and compelling reason why it should have equal access to pretrial affidavits which are made available to the Respondent. Section 706 of the Administrative Procedures Act, in pertinent part, provides as follows:

The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.²⁵

It should be self-evident that the need of the Charging Party here to protect its rights through appellate review is just as significant as that of the Respondent. Moreover, it should be equally manifest that the development of a "whole record" for such review may be impossible if the

Charging Party is deprived of access to the pretrial affidavits of witnesses. The General Counsel and the Charging Party are not one party, but two, as defined in Section 102.9 of the Board Rules. *Spector* is authority for the proposition that it would be error to deny examination by the Charging Party "solely" because the subject has been covered by the General Counsel, or because the General Counsel refuses to cover it. *Spector Freight System, supra* at 1110.²⁶ Consequently, it must follow that the Charging Party need not rely solely on the record developed by the General Counsel, and that it should have access to the statement of a witness after examination.

For all the foregoing reasons, the original order, upon motion of the Charging Party, requiring the production of Dennis Senftner's pretrial affidavit, after he had given testimony as a witness for the Respondent, is now reaffirmed.²⁷

CONCLUSIONS OF LAW

1. Senftner Volkswagen Corporation is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of John O. Newman, on January 26, 1980, and thereafter, thereby discouraging membership in the Union, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By refusing to reemploy John O. Newman because the Union filed an unfair labor practice charge on his behalf, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(4) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in the unfair labor practices described above, it will be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to offer John O. Newman immediate and full reinstatement to his former position as a mechanic in its service department or, if that position no longer exists, to a substantially equivalent position.

²³ See Fed. R. of Evid. 607. See also *United States v. Nobles*, 422 U.S. 225, 232 (1975), where the Supreme Court stated, "It was . . . apparent to the trial judge that the investigator's report was highly relevant to the critical issue of credibility. In this context, production of the [affidavit] might substantially enhance 'the search for truth,' *Williams v. Florida*, 399 U.S. at 82."

²⁴ See Fed. R. of Evid. 801 (d)(2).

²⁵ 5 U.S.C. §706 "Scope of Review."

²⁶ See also *Rickert Carbide Die, Inc.*, 126 NLRB 757, fn. 3 (1960).

²⁷ It is significant that Rule 26.2, added to the Federal Rules of Criminal Procedure on December 1, 1980, provides for production of statements of defense witnesses at trial in the same manner as now provided with respect to the statements of government witnesses. See: "Jencks Act Goes in Reverse," *Legal Times of Washington*, p. 5, January 5, 1981.

lent job, without prejudice to his seniority or other rights or privileges, and to make him whole for any loss of wages or other benefits that he may have suffered as a result of the discrimination against him on January 26, 1980, and thereafter. The backpay shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). Further, the Respondent will be required to preserve and make available to the Board, or its agents, payroll and other records to facilitate the computation of the backpay due.

Finally, in view of the recent decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), it does not appear that a broad cease-and-desist order is appropriate in the circumstances present here. Consequently, it will be recommended that the Respondent be ordered to cease and desist from violating the Act in "any like or related manner." *Igloo Corporation*, 254 NLRB 641, fn. 2 (1981).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²⁸

The Respondent, Senftner Volkswagen Corporation, Sioux City, Iowa, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to employ or otherwise discriminating against employees because they have engaged in concerted activity for their mutual aid or protection.

(b) Interrogating any employee concerning that individual's union interests or activity in a manner constituting a violation of Section 8(a)(1) of the Act.

(c) Refusing to employ or otherwise discriminating against any employees because unfair labor practice charges have been filed on their behalf.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer John O. Newman immediate and full reemployment to his former job as a mechanic in the service department or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any losses in accordance with the provisions set forth in the remedy section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other documents necessary and relevant to analyze and compute the amount of backpay due under this Order.

(c) Post at its facility in Sioux City, Iowa, copies of the attached notice marked "Appendix."²⁹ Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

²⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

²⁹ In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."